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Supreme Court of the United States

October Term, 1975
No. 75-971

CHARLES SIMPSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS EIGHTH JUDICIAL DISTRICT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*
ALBIN LIPOLD
Assistant Prosecuting Attorney
Criminal Courts Building
1560 East 21st Street
Cleveland, Ohio 44114
216/771-0660
Attorneys for Respondent

JAMES R. WILLIS
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100
Attorney for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The questions herein presented were raised in the trial court, the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The jury in the trial court found the petitioner guilty of selling an auto with altered identification number and two separate counts of concealing a stolen motor vehicle. The Court of Appeals affirmed the judgment of conviction. The Supreme Court of Ohio dis-

missed the petitioner's appeal for the reason that no substantial constitutional question existed.

The Ohio courts decided this case in accordance with the Statutes and Constitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

COUNTER QUESTIONS OF LAW

1. Probable cause for the issuance of a search warrant can be established from information supplied by the affiant from his own knowledge irrespective of any additional allegation in the affidavit attributed to an undisclosed informant.

2. A search warrant is valid if the information supplied by the affiant, based upon his own investigation, is accurate and standing alone is sufficient to establish probable cause. In such cases it is not necessary for the affiant to set forth all of the information received by him from an undisclosed informant.

3. It is proper to prove that an investigating officer met with an informer, had conversations with him and received certain information. Evidence that this conversation occurred, rather than testimony as to the conversation itself, is legitimate evidence of the fact that caused an investigation and is not hearsay.

4. Disclosure of unidentified informer will not be required where it is not shown that informant could have supplied information helpful to defense on the merits.

5. The receiving, buying, operating, concealing, or disposing of a motor vehicle are but different methods by

which a single offense may be committed and, as a result, they may be charged in one count for a single offense.

6. The date as shown on the indictment as the date of the crime determines the law to be applied in relation thereto.

7. The word "disguised" is a reasonable synonym to use in an instruction to the jury to explain the crime of concealing a motor vehicle under Ohio Revised Code, Section 4549.04(E).

HISTORY OF THE CASE

The petitioner, Charles Simpson, was indicted by the Grand Jury of Cuyahoga County, Ohio, during the September Term of 1972 for three separate felonies in two indictments. The first indictment charged him with selling an auto with altered identification number under Revised Code, Section 4505.19(D) and concealing a stolen motor vehicle under Revised Code, Section 4549.04(E). In the second indictment he was charged with Nancy Simpson of concealing a stolen motor vehicle under Revised Code, Section 4549.04(E).

The first count of one indictment charged:

> "That Charles A. Simpson on or about the 1st day of May 1970, at the County aforesaid, unlawfully did sell in this State a motor vehicle, to wit: Camero Automobile, on which the manufacturer's serial number has been destroyed, removed, covered, altered or defaced with knowledge of such destruction, removal, coverage, alteration or defacing of said manufacturer's serial number."

The second count alleged that:

"Charles A. Simpson on or about the 27th day of October 1972, at the County aforesaid, unlawfully did receive, buy or conceal a Cadillac Automobile, the personal property of Farmers Insurance Group, which had been stolen from Mark A. Hatley, the said Charles A. Simpson well knew said personal property to have been stolen or having reasonable cause to believe said automobile to have been so obtained as aforesaid."

In the second indictment he along with Nancy Simpson were charged as follows:

"That Nancy L. Simpson and Charles A. Simpson on or about the 27th day of October 1972, at the County aforesaid, unlawfully did receive, buy, conceal or operate a VolksWagen Automobile, the personal property of Allstate Insurance Company, which has been stolen from Allan Clapp, the said Nancy L. Simpson and Charles A. Simpson well knew said personal property to have been so obtained as aforesaid."

Upon arraignment he entered pleas of not guilty to each count.

Prior to trial, the court heard motions to quash the search warrants and to suppress evidence. After hearing testimony on the motion and arguments of counsel, the motions were overruled. Trial to a jury as to Charles A. Simpson, commenced on August 27, 1973 as to all three counts. On September 24, 1973 the jury found the petitioner guilty on all three counts. The petitioner was sentenced as appears of record.

State's Evidence on Motion to Suppress

Detective McComb, of the Automobile Theft Investigation Unit of the Cleveland Police Department testified

that he knew the petitioner Charles Simpson as an assistant prosecutor for the City of Cleveland. In September, 1972, an investigation began as to the petitioner dealing in stolen automobiles.

On October 10, 1972 Detective McComb met with an informant who related (R. 12-13, 14):

"A. At this time the information related to us that he was aware of a theft ring which was operating in the Cleveland area and that he told us that the people involved in this theft ring were proficient in the altering of vehicle identification numbers.

He told us that these people knew the locations of not only the public numbers, but also the confidential numbers on many makes of automobiles, including expensive cars such as Cadillacs, Buicks, and sports cars, Corvettes, Porsches, that type of thing.

He related in particular to Mr. Simpson, he told us that Mr. Simpson was in possession of a 1972 Cadillac Eldorado, that was a stolen vehicle.

He told us that the vehicle had been titled to Mr. Simpson by way of a salvage title obtained from a place called Moyer's Auto Wrecking in Crestline, Ohio. He told us that the title that was for this car was for a '71 model, although the car actually was a '72. And he told us that the people that had done the work on the car, the altering the numbers of that, had altered the appearance of the car to make it to appear to be a '71 in order to match the title.

He further said that Mr. Simpson was not in possession of a Porsche automobile. He said that this Porsche automobile had been stolen from Euclid, Ohio; that when it was stolen it was a Porsche model 911-T,

like in Tom, and he said the title of this car had been obtained from Moyer's Auto Wrecking for a model 911-E.

He said the identifying marks on this car had been altered to make it appear to be a 911-E to correspond with the title.

• • •

A. He further related that Mr. Simpson was in possession of a Volkswagen automobile which was stolen. He described it as a yellow Volkswagen with black interior. He told us that this car had been stolen on Euclid Avenue in Cleveland, Ohio, and again that the title for this car, that was in Mr. Simpson's name or possession, it was actually titled to Nancy Simpson, had been obtained from Moyer's Auto Wrecking in Crestline.

This is the same junk yard."

The informer also gave information as to a '69 Corvette that he believed Simpson had sold and a Camaro automobile which was stolen. He further mentioned an auto belonging to Simpson's mother, Rosa Simpson.

As a result of receiving such information, Detective McComb went to the Cuyahoga County Title Bureau and began pulling all the records he could find in regard to vehicles owned by Charles Simpson, Nancy Simpson, and Rosa Simpson. His investigation revealed that Charles Simpson held title to a 1971 Cadillac Eldorado auto previously owned by Pearson Motor Sales of Columbus, Ohio; that a 1970 Volkswagen was titled in the name of Nancy Simpson and the previous owner was Moyer's Used Cars, Crestline, Ohio; and that there was a dormant title issued to Charles Simpson for a 911-E Porsche auto, the title of

which was currently held by an insurance company. Titles were also discovered relating in particular to a Corvette, Camaro and other automobiles titled at one time to Charles Simpson.

Detective McComb then contacted the National Auto Theft Bureau in Chicago and asked them to check records in regard to the particular cars as described in titles he located at the Title Bureau. He requested information on the original factory records as to original equipment, color, owner, etc. He learned that the Volkswagen was first owned by Shirley K. Patton and was white in color with a red interior and had no air conditioner. The Cadillac was a fire mist burgundy colored car originally shipped to Franklin Cadillac in Cincinnati, Ohio. And the Porsche was reported stolen by Charles Simpson and that the E & E Insurance Co. had an interest in the vehicle at that time.

The investigation into the three cars titled in the Simpson name is as follows. First as to the Volkswagen originally owned by Shirley Patton (R. 29-30):

"A. Yes. I called her on the telephone and spoke to her about her Volkswagen.

I asked her if she could explain to me how it was her Volkswagen ended up over at Moyer's Auto Wrecking in Crestline.

And she told me that her car had been involved in a very serious accident, wherein it had rolled over a number of times and the body on the car was completely demolished.

She said she had subsequently been paid off by Nationwide Insurance Company and then the car was sold as a salvage to Moyer's.

Q. How, did you talk to anyone along the chain of title, with relation to the '71 Cadillac, that you were investigating, the car that was listed as a '71 Cadillac?

A. Yes. I called Mr. Ben Wescott, an employee of Cadillac Motor Division, of the Cincinnati office.

Mr. Wescott had this car assigned to him by Cadillac Motor Car Division for his personal use. And he told me that this car had been involved in a serious accident, wherein the front end of the car was completely demolished and that the second party involved in the accident was represented by Grange Mutual Insurance Company, that they had made settlement with Cadillac car, Cadillac Motor Car Division for the damage, and that Cadillac Motor Car Division then sold the vehicle as a salvage vehicle.

Q. As salvage?

A. Yes.

Q. By any chance, did you have any contact with anyone as far as the Porsche is concerned, you know, the previous chain of title?

A. Yes, I contacted Mr. Tom Caine, who was the owner on the title, previous to Moyer's.

Q. Where did he reside?

A. Galion, Ohio. And he told me virtually the same thing. His car had been involved in a serious accident wherein it rolled over and it was virtually unrepairable and he was paid off by his insurance company which, I don't recall offhand, which company it was.

Q. Okay. Did he say to whom the car was transferred?

A. Yes. He said it was subsequently transferred to Moyer's Auto Wrecking."

The National Auto Theft Bureau had no report on a stolen 1971 Cadillac from Northern Ohio but did have one on the '70 Volkswagen and Porsche that fit the general description given them (R. 31).

Charles Simpson was observed to be driving a Volkswagen and Eldorado Cadillac during the investigation. Detective McComb examined both cars. The Volkswagen was yellow with a black interior and with air conditioning. The Cadillac was black with a maroon interior. The Porsche was not observed at that time. As to the Cadillac, it was specifically checked to determine if the auto had original black paint and the investigating officers concluded that it did.

The National Auto Theft Bureau furnished further information that a Volkswagen owned by Alan Clapp was stolen from East 43rd Street and Euclid Avenue, Cleveland, Ohio, on August 10, 1971. Mr. Clapp gave certain information to Detective McComb about his car and specifically stated that he wrote his name and address on two pieces of paper and dropped them down inside the windows in the doors of the car, one on each side (R. 38).

Detective McComb then met with John T. Corrigan, Prosecuting Attorney for Cuyahoga County who drafted separate affidavits and search warrants for the search of the Volkswagen and the Cadillac. Detective McComb and John T. Corrigan then met with Judge David T. Matia (R. 41):

"Q. What happened when you met with Judge David T. Matia?

A. Well, again, I related virtually this entire story to Judge Matia. He asked me questions, just as you have here and I answered to his satisfaction.

Q. Now, at that time, were you sworn?

A. Yes, I was."

The affidavit for the search of the Volkswagen was signed and the search warrant issued as to that car only.

The warrant was served by Detective McComb and Sergeant Dierker upon the defendant in his office at the Central Police Station on October 27, 1972. The Volkswagen was then taken from the parking lot across the street to a police impound lot. Upon examination of the auto it was found that the engine number in the car was the one assigned for the Alan Clapp auto. The upholstery panels on both doors were pulled back and slips of paper with the name and address of Alan Clapp were found in each door. The auto had an air conditioner and was checked for further identifying marks. Photos were taken. The officers then proceeded as follows (R. 50):

"Q. Now, after the photographs were taken of this car, and after you made whatever observations you did at that time, what if anything, did you do next?

A. Well, at that time we were satisfied that we had in fact recovered Alan Clapp's car and so I went back to the Criminal Courts Building at this time and again I met with Mr. Corrigan and Judge Matia.

Q. Now, did you meet in his chambers again?

A. Yes.

Q. And what happened in his chambers at this time?

A. Well, at this time, I informed him that we had seized the Volkswagen and it had in fact turned out to be Alan Clapp's car as we had suspected.

At this time, based on the fact that the informant's information was totally accurate, in regard to the Volkswagen, we asked him to sign the affidavit for the search of the Cadillac automobile.

Q. Now, at that time were you under oath?

A. Yes. The Judge himself swore me in.

Q. Did you sign the affidavit at that time for the search of the Cadillac automobile?

A. Yes.

Q. Did the Judge issue the warrant?

A. Yes."

The search warrant for the Cadillac was then served upon Mrs. Simpson at the petitioner's residence and the Cadillac automobile taken from the garage.

On cross-examination Detective McComb stated that a man by the name of Tyrone Battle was not the informant (R. 66) and he did not meet the man or have conversation with him until December 17, 1972 (R. 120) after the warrants had been issued. He did, however, state that he had in his possession a typewritten summary of events in which the name Battle appeared prior to the issuance of the warrants. Detective McComb further stated that disclosure of the informant would not be given because, "We fear for his safety." (R. 68).

The petitioner offered no evidence on the motion to suppress evidence.

Copies of the search warrants and affidavits are attached to this brief and marked as Appendix A.

The State's Evidence

As to the Camaro automobile, wherein the indictment charged the petitioner Charles A. Simpson, with selling an auto with altered identification numbers, the evidence shows we are dealing with two separate cars.

Leonard F. Hotaling of Ashtabula, Ohio purchased a new 1968 Chevrolet Camaro auto on September 28, 1968 for $2,600. The car was bright yellow in color. In September of 1969 the Camaro was involved in an accident and totally wrecked. The Camaro was then sold as salvage for $200 to the R & R Motor Sales in Painesville, Ohio. As to the condition of the car, Roger Podges, an insurance adjustor, testified as follows (R. 365):

> "Well, it was, what I would call totally demolished . . . a basket case. It would be so badly damaged there wasn't possibly more than two or three salvageable panels on the whole automobile."

On December 23, 1969, Charles A. Simpson purchased the Camaro in its wrecked condition for $300 by signing a sales slip from R & R Motor Sales. The title to the Camaro was then transferred to Simpson.

On May 1, 1970, Charles A. Simpson sold a Camaro auto to Mary Ferguson of Medina, Ohio. He transferred the title from the wrecked car to her. The purchase price was $2,200.

David M. Ferguson, who drove the car, said it was an original black in color and never yellow (R. 393). In relation to the obliteration of a serial number on the Camaro, he testified that he observed, ". . . they were destroyed . . . they were smashed and then brazed over." (R. 396).

Detectives McComb and Tesar examined the Camaro in Medina, Ohio. They also observed that the car had

not been repainted; that the public vehicle identification number (VIN) seen through the front window matched that of the Hotaling auto; that the VIN number on the sheet metal on the cowl had been puddled by heat and was not legible; and that the secondary number in the area of the heater housing was not legible and appeared to have been heated by a torch and therefore puddled.

The petitioner Simpson and his wife, Nancy L. Simpson, were both indicted for concealing a stolen motor vehicle, a Volkswagen, the property of Allstate Insurance Company, which had been stolen from Alan Clapp. The evidence in relation thereto shows two automobiles to be involved; the first being a wrecked or salvage vehicle and the second a stolen vehicle.

Shirley Patton of Clyde, Ohio, purchased a new Volkswagen for $2,200 in 1970. The car was painted white and had a red interior without air conditioning. In July, 1971, her Volkswagen was involved in an accident. Clarence Weeks, an insurance claims adjustor, examined the wrecked Volkswagen. He stated that the car was a constructive total loss (R. 985) and that it was not feasible to go ahead and repair it.

The Volkswagen was then sold to Moyer's Auto Wrecking, Crestline, Ohio, by the insurance company for $330 on July 6, 1971. On September 8, 1971 the car was sold by Moyer's Used Cars to Nancy Simpson for $600 in its wrecked and junked condition.

Alan Clapp was the owner of a yellow Volkswagen with a black interior. The car had a model DPD air conditioner. On August 10, 1971 his Volkswagen was stolen from East 46th Street and Euclid Avenue, Cleveland, Ohio. He transferred his title to the car to Allstate Insurance Company on November 19, 1971 after they paid him for the theft loss.

The petitioner, Charles A. Simpson, was also charged with concealing a stolen motor vehicle, to-wit: A Cadillac, the property of Farmers Insurance Group which had been stolen from Mark A. Hartley. Again, the evidence discloses two vehicles to be involved. A wrecked or salvage 1971 Cadillac Eldorado convertible and a stolen 1972 Cadillac Eldorado convertible.

As to the 1971 Cadillac, or salvage vehicle, the evidence shows it was owned by the Cadillac Motor Division of General Motors; that it was being operated by a manufacturer's representative, Ben Wescott, of Cincinnati, Ohio; that the car had an almond fire mist color with a white top and was fully equipped. On June 26, 1971 the car was involved in an accident.

Ronald Lange, an insurance claims representative, examined the auto and estimated the repairs, parts and labor, to be $7,300. The auto was then sold for salvage to Frontier Auto Body & Sales in Walton, Kentucky for $2,250. From there the car was transferred to Bob Ratterman, Inc., Fort Mitchell, Kentucky, and to J & W Auto Wrecking in Jefferson, Ohio on January 31, 1972. Charles Simpson purchased the car for $5,500 (R. 513) in cash. The sale was consummated through Pearson Motor Sales in Columbus, Ohio. The car was sold in its junked condition with some extras, but not all necessary parts to make it roll (R. 536). The title was mailed to Charles A. Simpson in Cleveland, Ohio and he obtained a new certification of title on February 10, 1972.

As to the stolen 1972 Cadillac, it was originally owned by Master Lease, Inc. of Salt Lake City, Utah. The car was leased to Mark Hartley and licensed in Michigan. The car had a black top, black paint and dark red interior. This car was stolen from Mark Hartley in December, 1971 at about Christmas time from the Somerset Motel in

Shaker Heights, Ohio. The title to the 1972 Cadillac was sold and assigned (Ex. 40, 41A & 41B) to Farmers Insurance Group on March 28, 1972 after they had paid the theft loss claim (R. 1003).

Detective McComb testified, basically, as he did on the motion to suppress as to his investigation. Charles E. Allspaugh, Special Agent for the National Auto Theft Bureau in Chicago, Illinois, testified as to his cooperation with Detective McComb in obtaining information relative to certain automobiles prior to the issuance of the search warrants. At that time he conducted a suspect vehicle run for a 1971 Cadillac Eldorado with negative results.

After the Volkswagen and Cadillac were seized from the petitioner under the authority of search warrants they were examined closely by members of the Auto Theft Unit of the Cleveland Police Department and by William Lang, another Special Agent for the National Auto Theft Unit.

As to the Volkswagen, the public VIN was changed; that is, the VIN of the stolen Volkswagen was removed and replaced with the VIN from the wrecked Volkswagen; the VIN stamped on a metal plate under the floor was cut out with a welding torch and replaced with a plate and VIN from the wrecked car; and the VIN in the trunk of the car was also changed. Alan Clapp also examined the car and positively identified the same as the one stolen from him.

William Lang of the National Auto Theft Bureau testified that in relation to the Cadillac, the public VIN had been changed (R. 1593); that a secondary number which appears on the rear portion of the frame had been removed and replaced with the rear portion of another frame by welding it in; that the original engine and transmission numbers were ground out and restamped with other numbers; that the Federal sticker was changed; that the rear

deck lid was repainted and the car had features of a 1972 model; that he did restore the original number on the transmission by the use of a chemical process (R. 1605-1606) and this number was that of the stolen Hartley 1972 Cadillac. The replaced numbers found on the car were those of the wrecked 1971 Cadillac.

Detective McComb, who also examined the Cadillac, testified that some things appeared to belong to a '71 Cadillac and some to a '72 Cadillac (R. 1968); that the bottom plate attached to the cowl indicated that the automobile should have a white top and almond fire mist bottom. On October 31, 1972, he asked Charles Allspaugh, National Auto Theft Bureau, to check for a missing 1972 Cadillac (R. 1489 and 1971). The computer indicated a theft of a 1972 Cadillac stolen from Mark Hartley at the Somerset Inn in Shaker Heights, Ohio (R. 1492).

Tyrone Battle, who described himself as "an auto thief, auto stealer" testified that he knew Charles Simpson for about three or four years and also knew him to be a Cleveland Police Prosecutor (R. 741). He stated that he received a phone call from Simpson, ". . . he wanted to know when I was going out and get him a '70 or '72 Cadillac, black." (R. 743). He also had conversations with Kaiser Houston about the car. Along with John Willis, he found a car, 1972 Eldorado triple black convertible at a motel at Chagrin and Northfield with Michigan license plates. He stole the car and delivered it to Kaiser Houston. On the following day he went to Simpson's home where the petitioner paid him $400 in cash for the theft. He stated that he subsequently saw Simpson drive the car a couple of times (R. 751).

Tyrone Battle testified that, prior to the search he did talk to police and members of the F.B.I. in California but did not give them information about the Cadillac; that he

was under arrest at the time; and that he signed no statement of his activities as to Simpson until January 6, 1973. On January 6, 1973, after the search, he did make a signed three-page written statement (Court's Exhibits 3A, 3B, and 3C) and a video-tape recording.

In the presence of counsel for the petitioner, the statement was read into the record (R. 806-818) and the video-tape was shown and transcribed into the record (R. 856-887). The court ruled that there were no inconsistencies substantial in nature to allow cross-examination upon (R. 1014).

Gerald J. Kvet, Chief Police Reporter of the Cleveland Press testified that, after the seizure of the Simpson automobiles, he talked to Charles A. Simpson who said, ". . . He said the papers were in order and he said the cars were purchased from legitimate dealers . . . that it was a fair price." (R. 1370-1371).

During the trial, evidence was offered under Revised Code, Section 2945.59 *Proof of Defendant's Motive* in regard to three other totally wrecked automobiles purchased by the petitioner. They were a 1970 Porsche, 1969 Corvette and another 1969 Corvette.

The Porsche, originally owned by Thomas W. Cain of Galion, Ohio, was classified as a total loss on July 28, 1971 after a wreck. It was sold to Charles Simpson through Moyer's Used Cars on September 1, 1971 and reported stolen by the petitioner on June 29, 1972. A 1969 Corvette, originally owned by John D. Riley of Granville, Ohio was sold to the petitioner on March 10, 1971 through Moyer's Used Cars after an accident total loss settlement for the car.

The other 1969 Corvette, originally owned by Harold English was sold to Charles A. Simpson through Hilltop Auto Wrecking in Marietta, Ohio (R. 1049) on August 22,

1970. This car was completely burned and also declared a total loss. The title was placed in the name of Nancy Simpson and subsequently transferred to Michael P. DeGirolamo. Mr. DeGirolamo testified that he dealt with and purchased the car from Charles Simpson and that he paid Charles Simpson. This car was reported stolen about five months later.

Defense Evidence

Nancy Simpson, wife of the petitioner, testified that she purchased the Volkswagen from Kaiser Houston for $1,050. She presented a receipt (Defendant's Exhibit V) which does not indicate what the money was paid for and appears to be a rent receipt. She paid sales tax on $600. She stated that she knew Kaiser Houston as a former butcher and not as a used car dealer.

Nancy Simpson also testified that she purchased a 1969 Corvette through Andy Baumgardner of Sting Ray City in Cleveland, Ohio and not through Hilltop Auto Wrecking in Marietta, Ohio. She stated that she paid $3,000 for the car but does not have any receipts or other evidence of payment. When she obtained title to this Corvette she paid sales tax on a purchase price of $800. This car was subsequently sold to DeGirolamo.

Charles Simpson testified in his own behalf. He said he was employed as an Assistant Prosecutor for the City of Cleveland, Ohio since 1968. He further stated that he knew Tyrone Battle as a "wild kid in the neighborhood" (R. 2455) and that he met him on certain occasions at a gas station; that he also knew John Willis, Battle's accomplice in the Cadillac theft; and that he knew and dealt with Kaiser Houston but he did not know him as a car dealer. He denied talking to Jerry Kvet and making the

statement that he purchased the cars from legitimate dealers at a fair price (R. 2461).

Charles Simpson denied purchasing the Volkswagen but did admit driving same. He stated he purchased the Camaro from Richard Robinson and Tom Gregory and paid them $1,700 to repair the car. He denied purchasing the Camaro from R & R Motor Sales although his signature and telephone number appear on the sales slip (R. 2513-2514). He paid sales tax on a purchase price of $600. This car, he claims, he subsequently sold to Mary Ferguson.

As to the Cadillac, Simpson testified as follows on cross-examination (R. 2515):

> "Q. Did you buy this car from Pearson Motor Sales, the Cadillac, or did you buy it from Kaiser Houston?
>
> A. I would say both. They were both there.
>
> Q. Whom did you buy it from?
>
> A. It shows Pearson Motor Sales. I bought it from Pearson, if you want to say that, also through Kaiser or with Kaiser.
>
> Q. It is not what I want you to say, Mr. Simpson. Who did you buy the car from?
>
> A. I paid Kaiser Houston. I gave him the Cadillac. Pearson came in to finish the transaction. That to me meant that Kaiser apparently repaired the car and was selling it to me.
>
> Q. You mean he fixed it up?
>
> A. Yes. He fixed it up. You call it your words. I say repair.
>
> Q. Changing numbers?"

The petitioner further denied purchasing any automobiles from Moyer's Used Cars in Crestline, Ohio or Hilltop Auto Wrecking in Marietta, Ohio.

REASONS FOR DENYING THE WRIT

1. Probable cause for the issuance of a search warrant can be established from information supplied by the affiant from his own knowledge irrespective of any additional allegation in the affidavit attributed to an undisclosed informant.

It can be stated, as a general rule, that a search warrant should not issue where the affidavit does not provide a sufficient basis for a finding of probable cause. Also, probable cause exists where the facts and circumstances within the officers' knowledge and of which they have *reasonably* trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Carroll v. U. S.*, 267 U.S. 132.

It is the probability, and not a prima facie showing of criminal activity, that is the standard for probable cause for the issuance of a search warrant and as such the affidavits are tested by much less rigorous standards than those governing the admissibilty of evidence at trial. *Spinelli v. U. S.*, 383 U.S. 410.

In cases where an informant gives information, or a tip, to a law enforcement officer (affiant), there is no special test, rule, ritual or formula, or step-by-step procedure to be followed by a magistrate in determining whether or not probable cause exists for the issuance of a search warrant. Mr. Justice Fortas, in his dissenting opinion in *Spinelli*, and in discussing the case of *Aguilar v. Texas*, 378 U.S. 108, stated that as to the so-called "Two-pronged test":

> "The majority acknowledges, however, that its reference to a 'two-pronged test' should not be understood as meaning that an affidavit deficient in these respects

> is necessarily inadequate to support a search warrant. Other facts and circumstances may be attested which will supply the evidence or probable cause needed to support the search warrant. On this general statement we are agreed. . ."

A bare statement by an affiant that he believed the tip to be truthful would not, in itself, provide a factual basis for crediting the report of an unnamed informant. If however, the affidavit contains an ample factual basis for believing the informant, or showing him to be reliable, when coupled with affiant's own knowledge of specific facts, a basis is afforded upon which a magistrate could reasonably issue a warrant. *U. S. v. Harris*, 403 U.S. 573 (1971).

In *U. S. v. Harris* at p. 576 the court in discussing *Aguilar* stated that in that case "we held that an affidavit based *solely on the hearsay report* of an unidentified informant must set forth some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information reliable."

In footnote 1 of *Harris*, and referring to *Spinelli*, it is stated that where the affiant provides information in addition to the informant's tip, the magistrate could alternatively find probable cause, without examining the tip, if he could conclude that (a) the affiant is probably telling the truth and (b) the affidavit apart from the tip is sufficiently informative to establish probable cause.

The Court in *State v. Haynes*, 25 Ohio St. 2d 264 at 269 stated:

> "The court is concerned with probable cause, not *certainty*, and this extends to the determination of the reliability of the informer. It is not necessary to show uncontrovertible proof that the informer is reliable, but only that such information would cause

a neutral and detached officer to believe there is sufficient substance to the statement to justify a search of the premises."

The first search warrant issued by the judge in this case pertained to a Volkswagen auto only. There was no reference made in the affidavit to a Cadillac, Porsche, or any other car. In the affidavit, the informant's tip referred to a stolen Volkswagen, when it was stolen and where. Also, that the petitioner purchased a wrecked Volkswagen and from whom, and that the certificate of title to the wrecked Volkswagen was being used for the stolen Volkswagen.

The informant's tip, as to the Volkswagen, was in some manner confirmed, associated with the petitioner, corroborated or expanded upon by the police officer affiant and this additional information included in the affidavit. We feel that the underlying circumstances, as set forth, were sufficient to permit the magistrate to perform his independent function of determining the existence of probable cause.

In addition to the information contained in the Volkswagen affidavit, the issuing magistrate, prior to the issuance of the warrant, examined the affiant under oath as to the facts and circumstances stated in the affidavit. This procedure is deemed proper. *State v. Joseph*, 25 Ohio St. 2d 95. It is interesting to note, in *Aguilar* (footnote 1), that the record does not reveal, nor was it claimed that any other information was brought to the attention of the magistrate other than the affidavit, or its contents thereof.

After taking into consideration the informant's tip, the investigation which followed showing the information to be reliable, the additional information offered by the investigating affiant and included in the affidavit or orally

testified to under oath to the magistrate, that this was all more than sufficient to enable the magistrate to judge for himself the probable credibility of the informant and reliability of his information and the probable truth of the matters contained in the affidavit as testified to by the affiant. All this, we feel, is sufficient to provide a basis for the finding of probable cause.

The search warrants served upon petitioner were issued on October 27, 1972. The NEW OHIO CRIMINAL RULES OF PROCEDURE became effective on July 1, 1973. These rules, in particular Rule 41 *Search and Seizure,* should not apply to the facts in this case since they do provide for discretionary procedures available to the issuing magistrate which the judge on October 27, 1972 could not have been aware of.

2. A search warrant is valid if the information supplied by the affiant, based upon his own investigation, is accurate and standing alone is sufficient to establish probable cause. In such cases it is not necessary for the affiant to set forth all of the information received by him from an undisclosed informant.

Any reference by counsel for petitioner in his petition to reckless, untruthful misrepresentations, unintentional misrepresentations, or willfully deceptive representations of a material issue of fact is completely unwarranted. Counsel for petitioner concludes, instead of the trier of facts, that Detective McComb made inaccurate or willfully false statements in the affidavit. A reading of the affidavit does not disclose such statements.

A review of the testimony, on the motion to suppress, indicates that the informant's tip was valid. The subsequent investigation and testimony surrounding such tip, confirmed the fact, that indeed there was probable cause to believe

that the petitioner was using a certificate of title relating to a wrecked motor vehicle for a stolen motor vehicle as alleged in the affidavit to search the Volkswagen auto. Again, we are concerned with reasonably trustworthy information, an ample factual basis, the probable truthfulness of affiant's statement, sufficient substance to the informer's tip, probabilities and not certainties.

The Ohio Courts have not ruled on impeachment of the factual averments in an affidavit for a search warrant. This is apparently suggested by petitioner in citing the case of *North Carolina v. Wrenn*, 15 Cr. L. 4079. The majority rule precludes such impeachment.

In *North Carolina v. Wrenn*, the District Court, in granting a petition for a writ of habeas corpus, was of the view that it should not hesitate "to rule out erroneous averments in the affidavit and proceed to test the validity of the warrant in the light of the remaining uncontested averments." This being the minority view.

Assuming for purposes of argument, as to the search warrant for the Volkswagen, there was an erroneous averment in the affidavit, which we do not concede, then based on the remaining averments in the affidavit alone, and in particular the facts relating to the investigation and included therein, we feel, are still more than sufficient for probable cause and the issuance of the warrant.

The Court of Appeals in ruling on this issue held that no case has been cited that holds either (1) *all* information given to police officers by undisclosed informants must be stated in the affidavit, or (2) if any information stated by the informant turns out to be inaccurate, the search warrant is invalid notwithstanding the fact that the accurate information standing alone is sufficient to establish probable cause. See, *United States v. Damitz* (9th Cir., 1974), 495 F.2d 50 at 53-55.

We have no quarrel with the case of *United States v. Belculfine*, 508 F.2d 58 (1974) cited by petitioner. In *Belculfine* a positive statement was made in the affidavit stating an agent (or agents) saw a workbench. The evidence presented at the suppression hearing made it apparent that they (the investigating agents) could not have seen what they said they saw, and they admitted as much in their testimony at the hearing. *Belculfine* is distinguishable on its facts. In the matter now before this Court there was no such testimony.

3. It is proper to prove that an investigating officer met with an informer, had conversations with him and received certain information. Evidence that this conversation occurred, rather than testimony as to the conversation itself, is legitimate evidence of the fact that caused an investigation and is not hearsay.

As it relates to the informer, Detective McComb testified before the jury that (R. 1919):

> "A. . . . on October 10, 1972, Detective Tesar, Sergeant Dierker and myself met with an informant. . .
>
> • • •
>
> . . . who related information to us in regard to some particular automobiles that were owned by Mr. Simpson.
>
> • • •
>
> A particular Cadillac automobile, a Volkswagen automobile, a Porsche automobile, a Corvette automobile was mentioned. I believe a Chevrolet stationwagon was mentioned. There may have been others. I believe that was substantially it."

It was as a result of receiving this information that Detective McComb began his investigation at the Cuyahoga

County Title Bureau along with Detective Tesar. This testimony as elicited was not hearsay. The witness testified to the fact that information was received by him, rather than to the actual conversation itself.

It would be proper to prove the fact that Detective McComb met with an informer, had conversations with him and received certain information. These conversations are legitimate evidence of the fact that caused him to conduct the investigation and as such do not in any way come under the head of hearsay evidence. *Steward v. State*, 19 Ohio 302, 306; 21 OHIO JUR. 2d *Evidence*, Section 288.

The testimony of Detective McComb, before the jury, as to what the informant said to him in no way tended to incriminate the petitioner. The informer was not an out-of-court declarant against the petitioner. The accusing finger, during the trial, was not pointed, or guilt suggested, through this testimony.

4. Disclosure of unidentified informer will not be required where it is not shown that informant could have supplied information helpful to defense on the merits.

The right of government to withhold the identity of an informer falls within that broad class of communications which are labeled privileged. If the identity of informers are routinely disclosed, then communications of this kind will be discouraged. The government must rely upon informers to furnish them with a flow of information about criminal activities. Without them, the job of law enforcement is rendered almost impossible. To identify or name an informer might render him useless or even dead.

In order to force disclosure of the identity of the informer, an accused must show that such disclosure is relevant to the defense of his case on the merits. The request for disclosure cannot be merely in furtherance of a motion

to suppress. The defense must affirmatively show that the informer played a part in the transaction with which the petitioner is charged. *Rovario v. United States*, 353 U.S. 53; *United States v. Ruacho-Acuna*, 440 F.2d 1199; *United States v. Acosta*, 411 F.2d 627.

The government need not disclose the identity of its informer on an issue of probable cause for a search or arrest as long as the affidavit is based upon credible information supplied by what can be shown to be a reliable informer. *Davis v. Beto*, 432 F.2d 633; *Gonzales v. Beto*, 425 F.2d 963. The defense must show that the informer's identity is relevant to his defense on the merits. *United States v. Acosta*, 411 F.2d 627.

There was no evidence, or even proffer of evidence, in this case to show that the informer participated in the crime with which the petitioner was charged. However, Tyrone Battle, one of the persons who stole the Cadillac for the petitioner, and was paid for said theft by the petitioner, did testify. He denied being the informer. He made a written statement which was video-taped. The statement and tape were made available to petitioner. Needless to say, Tyrone Battle was cross-examined thoroughly. The allegation by petitioner that disclosure of the identity of the informer was necessary and relevant to this defense is without foundation.

During the trial the court ruled on three separate occasions that disclosure of the informant would not be required. At (R. 1026) the Court stated the State does not have to disclose the name of informant simply because counsel makes the assumption the police officer is lying (R. 1027). A motion for mistrial was overruled because the informer's identity has been withheld (R. 1961). The Court, again, ruled at the conclusion of Tyrone Battle's testimony, that the State is not required to disclose the

identity of the informer; the reason being that the informer was not an active participant in the crime charged (R. 2067).

There was no showing made that the identity of the informer was relevant to the defense of petitioner's case on the merits.

5. The receiving, buying, operating, concealing, or disposing of a motor vehicle are but different methods by which a single offense may be committed and, as a result, they may be charged in one count for a single offense.

Duplicity in an indictment is the joinder of two or more separate offenses in a single count. *Parker v. Maxwell* (1963), 174 Ohio St. 471. With regard to the offense of receiving stolen property, Revised Code, Section 2907.30, the Supreme Court of Ohio had recent occasion to examine the statute in order to determine whether it stated a single or several offenses. In *State v. Hopkins* (1971), 26 Ohio St. 2d 119, 121, the Court held that:

> "While buying, receiving, and concealing stolen property might appear to state separate offenses, . . . the General Assembly in R. C. 2907.30, has set forth one statutory offense."

The court adopted the reasoning in *State v. Schultz* (1917), 96 Ohio St. 114, holding that a similarly worded statute proscribed but one offense. The court in *Hopkins* quoted from the *Schultz* case at length:

> "'"A statute often makes punishable the doing of one thing or another, *or* another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all, violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. * * *"'" *State v. Hopkins, supra,* at pages 121-122.

The same reasoning applies to Section 4549.04(E), a statute with a purpose similar to Section 2907.30, but limited to motor vehicle crimes. As such, the receiving, buying, operating, concealing, or disposing of a motor vehicle are but different methods by which a single offense may be committed and, as a result, they may be charged in one count for a single offense.

6. The date as shown on the indictment as the date of the crime determines the law to be applied in relation thereto.

In both indictments, as to the Volkswagen and the Cadillac, the date of the alleged offense is October 27, 1972 and not March 20, 1972 or prior as suggested by counsel for appellants. The degree of proof required, and as set forth in Revised Code, Section 4549.04(E) (Eff. 3/20/72), was therefore proper.

Petitioner's argument in relation to a general verdict of guilty upon a charge of buying, receiving, and concealing a stolen auto are without merit. The citations of *Stromberg v. California*, 283 U.S. 359 and *Leary v. United States*, 395 U.S. 31, have no application here. All clauses of the statute, Ohio Revised Code, Section 4549.04(E) in reference to concealing a stolen motor vehicle are constitutional. Their validity is not in question.

7. The word "disguised" is a reasonable synonym to use in an instruction to the jury to explain the crime of concealing a motor vehicle under Ohio Revised Code, Section 4549.04(E).

The Court charged the jury as follows on the element of concealing a motor vehicle (R. 2714):

"The State must prove that the Defendant concealed the motor vehicle. You will determine from all the evidence whether the Defendant intentionally hid or put out of sight, or dissembled, or disguised or did any other act to keep the vehicle out of sight to avoid its being observed or discovered."

The Court explained its purported charge in relation thereto at (R. 2684):

"THE COURT: The Court has reconsidered its ruling relative to conceal, in reading the O.J. instruction 423.05.

It does use the word disguise, and because of that particular word, as well as the others, the Court will change its ruling relative to ruling out the charge of concealing and the court will charge on conceal in the two indictments relative to conceal.

MR. LIPOLD: Your Honor, I assume as part of your definition of conceal, you will indicate that to conceal also means to disguise?

THE COURT: As part of the charge I am going to use O.J.I. which uses the words, in parenthesis, disguise and I will use it in the disjunctive, or this, or disguise, or dissemble or whatever."

We feel the court did not commit error in giving this instruction.

CONCLUSION

We respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

By: ALBIN LIPOLD
Assistant Prosecuting Attorney
Criminal Courts Building
1560 East 21st Street
Cleveland, Ohio 44114
216/771-0660
Attorneys for Respondent

APPENDIX A

IN THE COURT OF COMMON PLEAS
CRIMINAL BRANCH

STATE OF OHIO)
) ss.
COUNTY OF CUYAHOGA)

SEARCH WARRANT

To: CHIEF OF POLICE OF THE CLEVELAND OHIO POLICE DEPARTMENT and/or DETECTIVE WILLIAM MCCOMB, a member of said Department.

WHEREAS there has been filed with me an affidavit consisting of two pages, a copy of which is attached hereto, designated as Exhibit A and A-1 and incorporated herein as though fully rewritten herein, wherein the affiant avers that he believes and has good cause to believe that the 1970 two door sedan Volkswagon, yellow in color with black interior, bearing license number A B 1114, titled in the name of Nancy L. Simpson and driven by one Charles A. Simpson, is in fact the automobile of one Allen Clapp stolen on August 10, 1971.

I am satisfied that there is probable cause to believe that the grounds for issuance of this search warrant exist.

You are hereby commanded in the name of the State of Ohio, with the necessary and proper assistance, to serve this warrant and search forthwith for the automobile specified, making search in the day season, and if said automobile or any part thereof be found, you are commanded to seize it, leaving a copy of this warrant and a receipt for the property taken, prepare a written inventory of the property seized and return this warrant, and bring the property found on such search forthwith before me, or some

other judge or magistrate of the county having cognizance thereof, to be disposed of and dealt with according to law.

Given under my hand, this 27th day of October, 1972.

/s/ DAVID T. MATIA
Judge, Court of Common Pleas
Cuyahoga County, Ohio

IN THE COURT OF COMMON PLEAS
CRIMINAL BRANCH

STATE OF OHIO)
) ss.
COUNTY OF CUYAHOGA)

AFFIDAVIT FOR SEARCH WARRANT

Before me, a Judge of the Court of Common Pleas of Cuyahoga County, Ohio, personally appeared William McComb, who being first duly sworn deposes and says that he is a member of the Cleveland Police Department and as such he received information from an informant to the effect that a Volkswagon automobile, 1970, was stolen in Cleveland, Ohio in the early part of August, 1971, that in the month of September, 1971, a Charles A. Simpson purchased a wrecked 1970 Volkswagon from Moyer's Used Cars and that he, Simpson, is using the title certificate relating to the wrecked Volkswagon for the aforesaid stolen Volkswagon.

The affiant says that this informant proved reliable by a subsequent check of the records of the Clerk's Office, which records reveal that one Nancy L. Simpson, the wife of Charles A. Simpson, is listed as the owner of a two door sedan 1970 Volkswagon, purchased September 14, 1971 from Moyer's Used Cars.

A further investigation reveals that Moyer's purchased this automobile the day previously, September 13, 1971, and the car had previously been owned by Shirley K. Patton. A further investigation reveals that this automobile was a white two door sedan with red interior. A further investigation reveals that a 1970 two door sedan driven by Charles A. Simpson, the husband of Nancy L. Simpson, the certificate of title which is traceable back to Shirley K. Patton does not relate to a white two door sedan with red interior but rather to a yellow two door sedan with a black interior.

Further investigation reveals that on August 10, 1971, a yellow two door sedan with a black interior Volkswagon was stolen from one Allen Clapp in Cleveland, Ohio. Further investigation reveals from a check of the National Auto Theft Bureau that this was the only Volkswagon stolen in Ohio during the months of August and September of 1971 that has not been recovered.

Further investigation reveals that the owner of the Volkswagon which had been sold to Moyer's Used Cars by Shirley K. Patton was a total wreck to such a degree that it was virtually impossible to repair the same.

All of the aforesaid investigative information and records dovetail with what the informant has advised and therefore makes him reliable.

Predicated on the foregoing, the affiant has reason to believe that the 1970 two door sedan Volkswagon, yellow in color, bearing license number A B 1114 and titled in the name of Nancy L. Simpson and driven by Charles A. Simpson, is in fact the automobile of Allen Clapp stolen August 10, 1971.

The affiant respectfully requests that a search warrant be issued in the day season to search for and seize

for the purposes of further identification the 1970 two door sedan, yellow in color with black interior, bearing license number A B 1114 wherever the same may be found within the jurisdiction of this Court.

/s/ WILLIAM MCCOMB

SWORN to before me and subscribed in my presence this 27th day of October, 1972.

/s/ DAVID T. MATIA
Judge, Court of Common Pleas
Cuyahoga County, Ohio

IN THE COURT OF COMMON PLEAS
CRIMINAL BRANCH

STATE OF OHIO)
) ss.
COUNTY OF CUYAHOGA)

SEARCH WARRANT

To: CHIEF OF POLICE OF THE CLEVELAND OHIO POLICE DEPARTMENT and/or DETECTIVE WILLIAM MCCOMB, a member of said Department

Whereas there has been filed with me an affidavit consisting of two pages, a copy of which is attached hereto, designated as Exhibit A and A-1 and incorporated herein as though fully rewritten, wherein the affiant avers that he believes and has good cause to believe that the 1971 Eldorado convertible Cadillac, black in color, titled in the name of Charles A. Simpson and driven by Charles A. Simpson is a stolen automobile. Said 1971 Eldorado convertible Cadillac titled and driven by Charles A. Simpson is bearing license number A B 1115.

I am satisfied that there is probable cause to believe that the grounds for issuance of this search warrant exist.

You are hereby commanded in the name of the State of Ohio, with the necessary and proper assistance, to serve this warrant and search forthwith for the automobile specified, making search in the day season, and if the automobile or any part thereof be found, you are commanded to seize it, leaving a copy of this warrant and a receipt for the property taken, prepare a written inventory of the property seized and return this warrant, and bring the property found on such search forthwith before me, or some other judge or magistrate of the county having cognizance thereof, to be disposed of and dealt with according to law.

Given under my hand this 27th day of October, 1972.

/s/ DAVID T. MATIA
Judge, Court of Common Pleas
Cuyahoga County, Ohio

IN THE COURT OF COMMON PLEAS
CRIMINAL BRANCH

STATE OF OHIO)
) ss.
COUNTY OF CUYAHOGA)

AFFIDAVIT FOR SEARCH WARRANT

Before me a Judge of the Court of Common Pleas of Cuyahoga County, Ohio personally appeared William McComb, who being first duly sworn deposes and says that he is a member of the Cleveland Police Department and as such he received information from an informant to the affect that a 1971 Eldorado convertible, black Cadillac, being driven by and titled in the name of Charles A. Simp-

son is a stolen automobile. The affiant says that predicated on this information, he determined from records of the Bureau of Motor Vehicles, State of Ohio, that there is a 1971 Eldorado Convertible titled in the name of Charles A. Simpson, which records reveal that Simpson allegedly acquired this automobile on February 10, 1972 from the Pearson Motor Sales, Columbus Ohio and that the Pearson Motor Sales Company had acquired the same automobile on February 2, 1972 from the J.W. Auto Parts, West Jefferson, Ohio, which company in turn had on February 1, 1972 acquired the same from Bob Ratterman, Inc., Fort Mitchell Kentucky.

The affiant further says that the records of the National Automobile Theft Bureau reveals that the automobile relating to the aforesaid title certificate was originally a metallic bronze color. The affiant says in the course of his investigation, he has, along with other members of the Cleveland Police Department, observed the 1971 Eldorado Convertible Cadillac, driven by Charles A. Simpson and it is the consensus of their opinion that that automobile painted black appears to be an original paint job.

The affiant says further that the informant has proven to be reliable for he has previously given information relative to Charles A. Simpson possessing a stolen Volkswagon automobile and that information has proven to be true.

Predicated on the foregoing, the affiant has reason to believe that the 1971 Eldorado convertible Cadillac, black in color, bearing license number A B 1115 is a stolen motor vehicle.

The affiant respectfully requests that a search warrant be issued in the day season to search for and seize for the purpose of further identification, the 1971 Eldorado con-

vertible, black in color, bearing license number A B 1115 wherever the same may be found within the jurisdiction of this Court.

/s/ WILLIAM MCCOMB

SWORN to before me and subscribed in my presence this 27th day of October, 1972.

/s/ DAVID T. MATIA

Judge, Court of Common Pleas
Cuyahoga County, Ohio